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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DWIGHT J. LOVING, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

REPLY BRIEF FOR THE PETITIONER

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In its brief [hereinafter Resp. Br.], the government reiterates many of the points made in its brief in opposition to the petition for writ of certiorari. In addition, it advances several new arguments intended to convince this Court that the President was acting within his authority when he promulgated Rule for Courts-Martial [hereinafter R.C.M.] 1004 and created aggravating factors to determine which servicemembers would be eligible for the death penalty.[1] Without repeating arguments made in his opening brief,

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[1] Petitioner challenges only the constitutionality of R.C.M. 1004(c), which creates aggravating factors.

petitioner must address several of respondent's points because they are either factually or legally incorrect, or because they are irrelevant.

A. THE DEATH PENALTY PROVISION OF U.C.M.J. ARTICLE 118 MAY NOT BE IMPLEMENTED WITHOUT CONGRESSIONAL ACTION.

The government asserts that the "linchpin" of petitioner's argument is that Uniform Code of Military Justice [hereinafter U.C.M.J.] article 118, 10 U.S.C. § 918, is a "nullity" after *Furman v. Georgia*, 408 U.S. 238 (1972). Resp. Br. 10. The government is incorrect, however, because petitioner's argument is not that Article 118's death-sentence provision is "null," but simply that it cannot be effectuated *in a constitutional manner* unless and until, as the Eighth Amendment requires, *Congress* establishes aggravating factors to guide the sentencer's discretion. *See United States v. Woolard*, 981 F.2d 756, 759, *reh'g denied*, 990 F.2d 819 (5th Cir. 1993); *United States v. Harper*, 729 F.2d 1216, 1225 (9th Cir. 1984).

Many death penalty statutes, both federal and state, were in effect in this country before *Furman*. Those statutes were constitutional when written, but this Court determined that, due to the unfettered discretion these statutes allowed judges and juries to exercise in capital cases, the death penalty was being applied in a racist and arbitrary manner. 408 U.S. at 242 (Douglas, J., concurring). This Court thus held that the death penalty as applied violated the Eighth Amendment. 408 U.S. at 239-40.

The government and its *amici* try in vain to exempt U.C.M.J. article 118 from *Furman*'s reach, but *Furman* requires that the unfettered discretion of sentencing panels in the military, or anywhere, be circumscribed by appropriate standards and the rule of law. The government

first speculates that "Congress could have reasonably concluded that those whom the government trains to kill have a special obligation of restraint that makes their commission of murder more morally culpable." Resp. Br. 11 n. 6. This is sheer speculation, and because raised for the first time in the government's brief, this Court should not consider it. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815 (1985).

Likewise, the Criminal Justice Legal Foundation (CJLF) argues that the military should be wholly exempt from *Furman*'s reach because the military is a "separate society" somehow outside the Constitution's full reach. CJLF 17-21. In the first place, neither party presented this issue to the Court and it should therefore be ignored. *Tuttle*, 471 U.S. at 815. Moreover, in *United States v. Matthews*, 16 M.J. 354, 369 (C.M.A. 183), the Court of Appeals for the Armed Forces, the highest military court, saw "no military necessity" for placing the men and women of the military outside the reach of the Eighth Amendment, holding instead that *Furman* and its progeny fully protect them. *Id.* Finally, not only did this Court hold long ago, prior to *Furman*, that the Eighth Amendment applies to the military, *see Trop v. Dulles*, 356 U.S. 86 (1958),[2] even the *Furman* dissenters acknowledged that the Court's decision invalidated the death penalty provisions of the U.C.M.J. *See Furman*, 408 U.S. at 417-18.

These new arguments, ripe with speculation, should be ignored. Not only are they untimely, the suggestion that

[2]The government relies on the Fifth Amendment exemption of the military from the grand jury requirement to assert that the Framers had no "special concern with shielding soldiers from the punishment of death." Resp. Br. 26-27. Significantly, however, the Fifth Amendment provision the government quotes clearly shows that while contemplating the special needs of the military, the Framers did not exempt the military from the Fifth Amendment Due Process Clause or the Eighth Amendment. *See United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) ("There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution").

the military is a "special society" to which "special rules" apply is utterly inept in this context. Petitioner's offenses have analogues in the civilian system and have no special significance in terms of military discipline or national security. None. If anything, an accused in the military needs more protection due to the problem of command influence inherent in the military system. Pet. Br. 15. Moreover, the CJLF argument that the military is immune from the same problems recognized in *Furman*—racism and arbitrariness—is wishful thinking at best; and pernicious at worst.

Prior to *Furman,* "black soldiers routinely were hanged while whites were spared." Richard Serrano, *A Grim Life on Military Death Row,* L.A. Times, July 12, 1994, at A1. It is no coincidence that seven out of eight men currently on death row in the military are minorities and there is a white victim in every case. Dwight Sullivan, *Military Death Row: Separate, Not Equal,* Nat'l. L.J., November 6, 1995, at A19. Finally, recent events at Fort Bragg attest, ugly racist hate groups exist in the military just as they exist at large. William Branigan & Dana Priest, *3 White Soldiers Held in Slaying of Black Couple; Ft. Bragg Suspect's Supremacist Views Were Well-Known, N.C. Officials Say,* Wash. Post, December 9, 1995, at A1; Serge Kovaleski, *Soldiers in White Supremacist Uniforms; 2 Murder Suspects From Fort Bragg Were Part of Fringe Culture,* Wash. Post, December 11, 1995, at A1. Petitioner is clearly entitled to the protections of the Eighth Amendment, including *Furman* and its progeny.

B. CONGRESS MUST ESTABLISH THE AGGRAVATING FACTORS IN CAPITAL CASES.

The government says that nothing in this Court's jurisprudence requires that legislatures—representatives of the people—establish aggravating circumstances. Indeed,

the government claims that, according to this Court, aggravating circumstances may be "legislative or court-imposed."[3] Resp. Br. 30 (quoting *Zant v. Stephens,* 462 U.S. 862, 880 (1983)). In *Zant,* this Court specifically stated that "statutory aggravating circumstances play a constitutionally necessary function at the stage of *legislative definition:* they circumscribe the class of persons eligible for the death penalty." 462 U.S. at 878 (emphasis added). The government quotation is misleadingly taken out of context. The quotation does *not* refer to the creation of aggravating factors. Instead, the Court merely observed that "the absence of *legislative or court-imposed* standards to govern the jury in *weighing the significance* of ... [the] aggravating circumstances does not render the Georgia capital sentencing statute invalid." 462 U.S. at 880 (emphasis added).

Moreover, the government attempts to gain shelter in opinions of this Court allowing state courts to narrow vague or overbroad statutory aggravating circumstances. *See, e.g., Proffitt v. Florida,* 428 U.S. 242 (1976). Resp. Br. 30 & n.19. These cases are irrelevant, however, because this Court has *never* indicated that any court may create the aggravating factors that make a defendant "death eligible." This Court has simply allowed state appellate courts to impose narrowing constructions on otherwise vague aggravators. The aggravating circumstances themselves, however, were enacted not by the courts, but by *state legislatures* expressing the people's will.

In the military context only Congress can say what aggravating circumstances should make a serviceman death-eligible, but it has not done so. The cases the

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[3]The government argues now that no legislative action is required to create aggravating circumstances. For many years, however, the Department of Justice conceded that legislative action *was required. See, e.g., United States v. Harper,* 729 F.2d 1216 (9th Cir. 1984).

government cites simply have no bearing on this case. As set forth fully in petitioner's opening brief, Congress and Congress alone must make the necessary policy choices. Pet. Br. 37-48.

C. THE PRESIDENT HAS NO INHERENT AUTHORITY TO ESTABLISH AGGRAVATING FACTORS.

The government attempts to circumvent the need for an explicit delegation of authority. *See* Pet. Br. 11-12. It asserts that the "Commander-in-Chief's constitutional authority easily encompasses," Resp. Br. 16, the authority to create aggravating factors in capital cases and, therefore, the ordinary constitutional limitations on the power of Congress to confer law-making authority on the Executive Branch are less stringent. Resp. Br. 14-19. The government is wrong. The President has no inherent authority to establish punishments. In fact, this Court unambiguously declared in *Solorio v. United States*, 483 U.S. 435, 446 (1987), that "Congress, and not the Executive, was given authority to make rules for the regulation of the Armed Forces." *Solorio* specifically refutes the government's argument that the President has inherent powers in the courts-martial context. *See also Schick v. Reed*, 419 U.S. 256, 267 (1974) ("Of course, the President may not aggravate punishment"). Moreover, the Constitution itself specifically reserves to Congress the power "to make rules for the government and regulation of the land and naval forces." U.S. Const. Art. I, § 8, cl. 14.

This Court's opinions in *United States v. Mazurie*, 419 U.S. 544 (1975); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1 (1926); and *Cargo of the Brig Aurora v. United States*, 11

U.S. 382 (1813), all of which the government cites, Resp. Br. 14, do not support its assertion that the President has any inherent authority in this area. In *Mazurie*, this Court held that Congress may delegate authority to regulate alcoholic beverages in Indian territory to tribal authorities. In *Knauff*, although recognizing that the executive has inherent authority in the arena of foreign affairs to exclude aliens, the Court upheld the executive's action based on a *specific* delegation of authority from Congress. Likewise, in *Chemical Foundation*, this Court upheld the Executive Department's sale of patents, copyrights, and trade-marks seized from German citizens based on a *specific* delegation of authority.

The most illuminating case the government relies upon is *Curtiss-Wright*, 299 U.S. 304, in which the Court held there was no violation of the doctrine of separation of powers when Congress delegated authority to the President to determine whether an embargo on the sale of arms and munitions to belligerents in the Chaco war was necessary. In deciding the issue, this Court recognized not only that there was a specific delegation of authority, but also that in the arena of foreign affairs the President's inherent authority is at its pinnacle. *Curtiss-Wright*, 299 U.S. at 315-16. Thus it is clear that none of these cases are relevant to the *internal* domestic affair of governing the armed forces within the geographical limits of the United States during peacetime.

This Court has recognized that the President does have some limited inherent authority as Commander-in-Chief. *See, e.g., Department of the Navy v. Egan*, 484 U.S. 518 (1988); *Ex Parte Quirin*, 317 U.S. 1, 10 (1942); *Swaim v. United States*, 165 U.S. 553 (1897). However, this Court has never recognized any inherent authority to establish criminal offenses, procedures for courts-martial, or criminal penalties. Indeed, this Court specifically recognized long ago that "it has not yet been definitely established to

what extent the President, as Commander-in-Chief of the armed forces, or his delegates, can promulgate, supplement or change substantive military law as well as the procedures of military courts in time of peace, or in time of war." *Reid v. Covert*, 354 U.S. 1, 38 (1957).[4]

Moreover, as is apparent from *Kent v. Dulles*, 357 U.S. 116 (1958), no alleged inherent authority as Commander-in-Chief alters the requirement for an explicit delegation. In *Kent*, this Court held that the President's inherent authority in foreign relations and national security does not override individual rights, despite the fact that this Court has repeatedly recognized that the President's powers are greatest in the area of foreign relations. *See Knauff*, 338 U.S at 542; *Curtiss-Wright*, 299 U.S. at 320. It is apparent, therefore, that if the President's broad inherent authority in foreign affairs is insufficient to permit less stringent review when an individual's personal rights have been infringed, then his limited authority as Commander-in-chief does not justify less stringent review under these circumstances.[5]

D. THERE IS NO EXPLICIT DELEGATION OF AUTHORITY.

The government asserts that U.C.M.J. articles 18, 36, and 56, 10 U.S.C. §§ 818, 836, and 856, "plainly authorize the President to provide that fewer than all of the defendants whom Congress has made eligible for the military death penalty may actually suffer that punishment." Resp. Br. 13. In making this assertion, the government ignores the plain language and intent of those

[4]Significantly, *Reid* was decided after every single case which the government relies on to assert that the President has inherent authority in this context. Resp. Br. 16-19.

[5]Again, while U.C.M.J. article 118 authorizes death as a punishment, *Furman* rendered the death sentence provision invalid unless and until Congress takes additional action to specify aggravating circumstances.

provisions. In addition, the government rebukes petitioner because he does "not even attempt to offer a coherent interpretation of Articles 18, 36, and 56 that is faithful to the language of those articles." Resp. Br. 41.

The government's response begs the primary question. Either there is an explicit delegation with an intelligible principle for the President to follow or there is not. If there is an explicit delegation, there is no need—and no requirement—that petitioner offer an interpretation to explain the delegation. On the other hand, if there is no explicit delegation, which there is not, no interpretation is needed because any delegation under these circumstances *must be explicit. See Greene v. McElroy*, 360 U.S. 471, 507 (1959); *Kent*, 357 U.S. at 129; Pet. Br. 7-13.

In any event, petitioner does "offer a coherent interpretation." Resp. Br. 41. Article 18 is in Subchapter IV (titled "Court-Martial Jurisdiction") and merely establishes the jurisdiction of a general courts-martial. Article 36 is in Subchapter VII (titled "Trial Procedure") and merely allows the President to establish procedures for courts-martial. Article 56 (captioned "Maximum limits"), while in Subchapter VIII (titled "Sentences") merely allows the President to set maximum punishments for offenses when Congress has not addressed the maximum punishment in the punitive articles of the U.C.M.J.

The government asserts that the combination of Articles 18 and 56 allow the President to "limit" the death penalty as authorized by Congress in U.C.M.J. article 118 or any of the articles in which death is an authorized punishment. Resp. Br. 9, 13, 35 n.21. The government also argues that the President was merely "faithfully execut[ing]" the laws Congress has created. Resp. Br. at 17. While these are unique arguments, they fail for a number of reasons.

First and foremost, because the government has never raised these arguments before, they should not be heard now. *Tuttle*, 471 U.S. at 815. In addition, the government

stretches logic and plain language. The government argues that Congress made all persons convicted of U.C.M.J. article 118 eligible for the death penalty. Therefore, in its view, petitioner would have been subject to the death penalty even if the President had not prescribed aggravating factors in R.C.M. 1004. The government thus argues that the President is helping those convicted of murder because he has *excluded* some accuseds from Congress' delimited death-eligible pool. Resp. Br. 39-40. This argument ignores reality and misunderstands and distorts this Court's capital punishment jurisprudence.

First, neither petitioner, nor any other military accused, could constitutionally be sentenced to death for committing an Article 118 offense without any additional finding of aggravating factors. *See Furman v. Georgia,* 408 U.S. 238 (1972); *United States v. Matthews,* 16 M.J. 354 (C.M.A. 1983). Thus, the President is not narrowing or "limiting" the class of persons eligible for the death penalty: He is *creating* it. *See Zant v. Stephens,* 462 U.S. at 878 (aggravating factors *define* the class of persons eligible for the death penalty). Likewise, the President is not "faithfully execut[ing] laws: He is creating law. *See Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 587 (1952) ("The President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker").

Second, the government's argument that the President was merely acting on Congressional intent to implement the death penalty ignores post-*Furman* political realities. Outside of certain limited death penalty provisions, *see, e.g.,* 49 U.S.C. §§ 1472 & 1473 (aircraft piracy);[6] U.C.M.J. article 106a (espionage by military members); 21

[6] 49 U.S.C. § 1472 was recodified as 49 U.S.C. § 46502 in July 1994. 49 U.S.C. § 1473 was recodified as 49 U.S.C. § 46503 in July 1994 and repealed in September 1994. The aggravating circumstances that now apply to aircraft piracy are found in 18 U.S.C. § 3592, which was enacted in September 1994.

U.S.C. § 848 (continuing criminal enterprise involving drugs and murder), Congress has not been able to reach (prior to the September 1994 enactment of 18 U.S.C. §§ 3591-93) a political consensus to implement the death penalty on a broad scale. Thus, President Reagan, hoping to apply and enforce the death penalty in the military, but unable and without authority from Congress to do so, *created* the post-*Furman* military death penalty. Any doubt about this political reality is dispelled by the fact, which the government does not mention, that bills to enact R.C.M. 1004 were introduced in Congress—not once, but twice—and *failed* to pass. *See* H.R. 3652, 99th Cong., 1st Sess., 131 Cong. Rec. 9462 (1985), introduced October 30, 1985; H.R. 731, 100th Cong., 1st Sess., 133 Cong. Rec. 387 (1987), introduced January 22, 1987.

Moreover, the government's reliance on the word "procedures" in Article 36 as an express delegation is misplaced. The government asserts that this Court's use of the word "procedural" in *Dobbert v. Florida,* 432 U.S. 282, 293 (1977), supports its position. Resp. Br. 36 n.23. The government fails to understand, however, that the word "procedural" means something different when applied in different legal contexts and issues.

> Matters of "substance" and matters of "procedures" are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, "substance" and "procedure" are the same key-words to very different problems. Neither "substance" nor "procedure" represents the same invariants. Each implies different variables depending upon the particular problem for which it is used. And the different problems are only distantly related at best ....

Guaranty Trust Co. of New York v. York, 326 U.S. 99, 108 (1945) (citations omitted). Thus it is "immaterial" whether

a particular matter is "characterized either as 'substantive' or 'procedural,' " because the law is not concerned with formulating "scientific legal terminology." *Id.* at 109. The issue turns instead on the "intent" and the policy determination behind the law and not on some empty ritualistic adherence to the terminology the courts happen to use in different factual contexts and with respect to very different legal issues. *Id.*

The government simply ignores the facts and the legal issue involved in *Dobbert* and urges the Court to mindlessly rely on "terminological niceties." *Guaranty Trust Co.*, 326 U.S. at 110. In *Dobbert*, this Court was concerned with whether an *ex post facto* violation had occurred when the state applied a capital statute enacted after the offense was committed and which changed the capital sentencing structure in Florida from jury sentencing to judge sentencing. *Dobbert*, 432 U.S. at 287-92. *Dobbert* did not address the nature of aggravating circumstances. The issue before the *Dobbert* Court was simply whether "the change in the role of the judge and jury in the imposition of the death sentence in Florida ... constitutes an ex post facto violation." *Id.* at 292. This Court determined only that *the change from jury sentencing to judge sentencing was procedural for purposes of evaluating an ex post facto claim. Cf. Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958). It did not address the nature of statutory aggravating circumstances in any way.

In the context of creating aggravating factors to determine the class of offenders eligible for the death penalty, the aggravating factors created by the President are not merely "trial procedure[s]" (as defined by U.C.M.J. Subchapter VII) he is authorized to create under Article 36.[7] The aggravating factors define the class of

[7]Indeed, R.C.M. includes a section captioned "Procedures." R.C.M. 1004(b). The President's authority to create these procedures is not challenged in this case. Significantly, however, the aggravating factors are *not* included in "procedures" section but are included instead in R.C.M. 1004(c).

persons on whom the death penalty can be applied.[8] *Zant v. Stephens*, 462 U.S. at 878; *see also Sawyer v. Whitley*, 505 U.S. 333, 344-45 (1992). Thus, the aggravating factors increase the penalty for which petitioner would otherwise have been eligible. Given this fact, aggravating factors cannot be viewed as merely procedural. *Miller v. Florida*, 482 U.S. 423, 433 (1987) ("Although the distinction between substance and procedure might sometimes prove elusive," a provision which increases the penalty for which a defendant will be eligible cannot be "deemed procedural").

E. THERE IS NO IMPLICIT DELEGATION OR RATIFICATION OF AUTHORITY.

The government asserts that the President's alleged authority to establish aggravating factors in capital cases is "also confirmed by Congress's longstanding practice, from the founding of our Government, of deferring to the President (or his subordinate, the court-martial) on questions of military discipline and punishment, including the circumstances that warrant the penalty of death when authorized by statute." Resp. Br. 19. Following this bold assertion, the government spends a full seven pages of its brief discussing history.

The first problem with the government's historical argument is that it fails to distinguish between capital and non-capital cases and between capital offenses that are uniquely military and capital offenses that have civilian-law parallels. Despite broad powers granted to the President and to courts-martial throughout history, Congress has always jealously guarded the power to authorize death as punishment, and until 1950 it refused to allow a court-martial to sentence an accused to death for the non-

[8]*See* Brief of the American Civil Liberties Union at 8-11 (discussing substantive nature of aggravating factors).

military offenses of murder and rape in peacetime within the geographical limits of the United States.[9] Pet. Br. 13-16. In addition, Congress exhibited, in the U.C.M.J., special concern for capital cases.[10] Thus, it is most improbable that Congress reversed course *sub silentio* and gave the President free reign to decide which servicemembers would be eligible for the death penalty.

The second basic flaw in the government's historical discussion is that it ignores the fact that, even if the government is right that Congress allowed the President and courts-martial such discretion before *Furman*, unguided discretion has been foreclosed by *Furman* and its progeny. Thus, even if it is true that Congress has allowed two hundred years of "unfettered discretion in military capital cases," Resp. Br. 20, that fact is utterly irrelevant to the question this case presents.[11]

Finally, the government's argument is inconsistent with this Court's decision in *Solorio v. United States*, 483 U.S.

[9]The government is incorrect in asserting that petitioner is attempting to "revive the 'service connection' requirement" that was rejected by this Court in *Solorio v. United States*, 483 U.S. 435 (1987). Resp. Br. 27. Petitioner has merely pointed to the historical treatment of non-military capital offenses because Congress' treatment of these offenses clearly dispels any inference that Congress implicitly delegated broad authority to the President to establish aggravating factors in capital cases.

[10]*See, e.g.*, U.C.M.J. article 45, 10 U.S.C. § 845 (no guilty pleas in a capital case); U.C.M.J. article 52, 10 U.S.C. § 852 (unanimous vote on sentence required only in capital cases); U.C.M.J. article 61, 10 U.S.C. § 861 (accused cannot waive or withdraw appeal in capital case).

[11]The government chides petitioner for allegedly being anachronistic, Resp. Br. 26-28, in pointing out Congress' historical preclusion of military jurisdiction in capital offenses which have analogues in civilian law. Contrary to the government's proclamation that "petitioner cannot seriously suggest that Congress' choice of that solution reflected any special concern" of protecting individual rights, Resp. Br. 28, petitioner propounds exactly that premise. *Lee v. Madigan*, 358 U.S. 228, 235 (1959) ("We will attribute to Congress a purpose to guard jealously against the dilution of the liberties" of servicemen); *see also Solorio*, 483 U.S. at 447 ("Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military").

435 (1987). In *Solorio*, the Court discussed at length the history of courts-martial jurisdiction in the United States, and the Framers' uneasiness with the expansive use of courts-martial. After doing so, the Court stated:

> The unqualified language of [U.S. Const. Art. I, § 8] Clause 14 suggests that whatever these concerns, they were met by vesting in Congress, rather than the Executive, authority to make rules for the government of the military.

483 U.S. at 446.

F. CONGRESS HAS NOT PROVIDED SUFFICIENT GUIDELINES FOR THE PRESIDENT TO FOLLOW.

The government argues that the President has "independent constitutional authority" even if Congress has left him "standardless." Resp. Br. 41. To begin with, the President has no inherent authority in this arena, *supra*, at 6–8, and, even if he does, Congress still must provide more than a "standardless delegation." *See South Dakota v. United States Department of the Interior*, 69 F.3d 878, 883 (8th Cir. 1995).

Second, the government cites this Court's opinion in *Lichter v. United States*, 334 U.S. 742, 785 (1948), for the proposition that Congress need not provide a "specific formula" to guide the President. Resp. Br. 42. Once again, the government sadly takes language out of context. In *Lichter*, this Court held:

> It is not necessary that Congress supply *administrative officials* with a specific formula for their guidance *in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions* constitute the essence of the program.

334 U.S. at 785. *Lichter* thus provides no assistance to the government since the question here does not involve a technical administrative decision requiring flexibility. Pet. Br. 39-41.

Finally, the government assertion that U.C.M.J. article 18 guides the President's discretion because it allegedly contemplates that the President would refer to U.C.M.J. article 55, 10 U.S.C. § 855, ignores several pertinent facts. First, the government has never relied on Article 18 as establishing guidelines for the President to follow. Second, the government has never relied on Article 55 to guide the President's authority. This argument is thus procedurally barred. *Tuttle*, 471 U.S. at 815. Moreover, even if this argument is properly before the Court, Article 18 does not, as petitioner has previously noted, confer any authority upon the President. It simply establishes the jurisdiction of general courts-martial.

The complete lack of Congressional guidance is even clear from the government's argument that "Congress doubtless expected" the President to be guided by such intangible factors as "the needs of military discipline" and "his own judgment regarding the sorts of factors that would make a statutory sentence unduly harsh as applied to specific circumstances." Resp. Br. 43. If Congress "expected" any such thing, it did not set forth its expectations in any provision of the U.C.M.J. Moreover, the factors the government cites as guidance simply prove petitioner's point that Congress did not guide the President's discretion at all but left the President to use his 'own judgment." Resp. Br. 43. Under these circumstances, it is clear that there is no way to look at any single aggravating factor—or even all of them—and "ascertain whether the will of Congress has been obeyed." *Mistretta v. United States*, 488 U.S. 361, 379 (1989); *see also Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218-19 (1989); *Yakus v. United States*, 321 U.S. 414, 425 (1944).

G. PURSUANT TO ARTICLES I AND II OF THE UNITED STATES CONSTITUTION, CONGRESS MAY NOT DELEGATE TO THE PRESIDENT AUTHORITY TO ESTABLISH AGGRAVATING FACTORS WHICH DETERMINE THE CLASS OF PERSONS ELIGIBLE FOR DEATH.

Both the government and its *amici* apparently suggest that petitioner is arguing the Eighth Amendment includes a separation of powers element. Resp. Br. 29-30, CJLF 11-16. Moreover, the government and its *amici* assert that a ruling in favor of petitioner will transform the Eighth Amendment into a separation of powers rule applicable to the states. Resp. Br. 29-30, CJLF 13.[12]

First and foremost, petitioner *does not* argue that some mysterious separation of powers component latent in the Eighth Amendment prohibits the President from establishing aggravating factors. On the contrary, petitioner simply contends that the President's action violated the separation of powers doctrine as embodied in Articles I and II of the Constitution *and* that to execute petitioner when no constitutionally created aggravating factors exist would violate the Eighth Amendment. Clearly, a decision in petitioner's favor will not create any new rule of law applicable to the states. *Cf. Maynard v. Cartwright*, 486 U.S. 356 (1988); *Godfrey v. Georgia*, 446 U.S. 420 (1980).

Second, the government is incorrect when it asserts that the "catch-all provision" of 18 U.S.C. § 3592(c), which establishes aggravating factors to be applied in federal death penalty cases, "undermines petitioner's contention that the designation of specific aggravating factors is, and

[12] Even assuming that such an argument had been made, it would not have the far-reaching impact urged by the government and its amici. Indeed, it would have no impact because no state in this country with capital punishment as a permissible punishment has allowed the governor to create aggravating circumstances.

that Congress would expect it to be, peculiarly a legislative choice.'' Resp. Br. 47 n.31. Section 3592(c) allows the sentencer in murder cases, *after finding the existence of at least one aggravating factor enumerated by Congress,* to consider ''any other aggravating factor'' for which the prosecutor has given notice. The government ignores the fact that a finding of ''any other factor,'' without a finding of one of the factors specifically listed by Congress, does not make a defendant death-eligible. 18 U.S.C. §§ 3592(d) & 3593(e).

When the entire statutory scheme—as opposed to one small section taken out of context by the government—is considered, it is clear that through the factors enumerated in Section 3592, Congress determined which defendants convicted of murder would be eligible for the death penalty. Therefore, the aggravating circumstances Congress enumerated in Section 3592 are the factors which *determine death eligibility* within the broad class of persons convicted of murder. *See United States v. Davis,* ___ F.Supp. ___, 1995 WL 628013 (E.D. La. October 28, 1995). In the civilian federal death penalty context, therefore, Congress has not abdicated its responsibility to determine death eligibility.

The ''catch-all provision'' is simply analogous to an evidentiary rule that allows the government to present evidence of ''non-statutory'' aggravating circumstances that the judge or jury may consider after it has determined (by a finding of an enumerated factor) that the defendant is death-eligible. *See Zant v. Stephens,* 462 U.S. at 878. In stark contrast to the ''catch-all provision'' of 18 U.S.C. § 3592(c), the aggravating factors in R.C.M. 1004(c) are not simply evidentiary rules that allow the panel to consider non-statutory aggravating circumstances *after making the guided determination that the accused is within the narrowed class of persons eligible for the death penalty.* On the contrary, the aggravating factors in R.C.M.

1004(c) are used to *determine who among those convicted under U.C.M.J. article 118(1) and (4) will be eligible for the death penalty.* In short, there is simply no analogy to be drawn between R.C.M. 1004(c) and 18 U.S.C. § 3592-(c).

H. THE NATURE OF THE AGGRAVATING FACTORS SELECTED BY THE PRESIDENT IS IRRELEVANT TO THE DETERMINATION OF WHETHER THERE IS A CONSTITUTIONAL VIOLATION IN THIS CASE.

In its concluding paragraph, the government asserts that ''many of the aggravating factors [Congress] adopted for capital homicide offenses [in 18 U.S.C. § 3592] were virtually identical to those earlier identified by the President'' in R.C.M. 1004(c). Resp. Br. 46. Petitioner does not dispute this claim, but, standing alone, it is irrelevant. The government goes further, however, and declares: ''With the actions of the President and Congress so closely aligned, petitioner has given this Court no sound reason to overturn the President's judgment in promulgating RCM 1004.'' Resp. Br. 47.

This assertion fails to grasp the significance of the issues before this Court. Petitioner has not challenged—and this Court did not grant the writ of certiorari to review—the nature of the aggravating factors in R.C.M. 1004(c). Simply stated, the supposed contemporary ''alignment'' between the President and Congress does not justify and cannot withstand the violation of the separation of powers. The President was—and is—without power to create aggravating factors to define the class of servicemembers eligible for the death penalty.

The President has authority to convene courts-martial, to prosecute cases as capital, to select the members, to select the judge, and to approve the resulting death sentence or

commute it. Pet. Br. 48-49. The government now asks this Court to hold that the President has the inherent authority to create law by defining the class of persons eligible for the death penalty. This "blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers." *See Reid v. Covert,* 354 U.S. at 39. The government's request must therefore be rejected.

CONCLUSION

For the foregoing reasons, as well as for all the reasons set forth in petitioner's opening brief, this Court should reverse the judgment of the United States Court of Appeals for the Armed Forces.

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